Supreme Court, U.S.
FILED
MAY 15 2003
OFFICE OF THE CLERK

No. 02-1519

IN THE

Supreme Court of the United States

RONALD AND MADELINE MOSS, on behalf of their minor child, BOBBY MOSS, and LUCILLE VENTURA, on behalf of her minor child, JOSE VENTURA,

Petitioners,

v.

CLARA D. CARRIER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

NORA M. STELLY
ALLEN & GOOCH
1015 St. John Street
Post Office Box 3768
Lafayette, Louisiana 70502
(337) 233-5056

Attorneys for Respondents

180841

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the district court correctly dismissed the claims brought on behalf of Jose Ventura based upon *res judicata*.

2. Whether the district court correctly dismissed the due process claims brought on behalf of Bobby Moss.

3. Whether the district court correctly dismissed the claims against individual defendants, based on qualified immunity.

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Court Below

On September 7, 2001, nearly-identical Complaints for Damages were filed in United States District Court, Western District by Ronald and Madeline Moss on behalf of their daughter Bobby and Lucille Ventura on behalf of her son Jose. The parents asserted entitlement to recovery of damages for alleged violations of their children's Constitutional rights by members of the Iberia Parish School Board, the system superintendent, the summer school principal and the acting principal. Specifically, the claimants alleged that their children's rights to procedural due process were violated when the defendants dropped the students from summer school. Defendants answered the lawsuits, asserting the defense of qualified immunity. In a 'heightened pleading' review the magistrate determined that an order limiting discovery would not be appropriate. On January 11, 2002, a Motion to Consolidate was filed by Defendants, which motion was opposed by Plaintiffs. The matters were consolidated on January 31, 2002 under the first-filed docket number (Moss).

After a lengthy discovery period, Defendants filed a Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment, seeking dismissal of all claims against all defendants. After considering the memoranda submitted by the parties, Judge Richard Haik granted summary judgment on May 6, 2002, dismissing all claims. Plaintiffs filed a Notice of Appeal on or about May 30, 2002. On January 17, 2003, the U.S. Fifth Circuit Court of Appeals affirmed the district court judgment.

B. Statement Of Facts

During the 2000-2001 school year, Jose Ventura and Bobby Moss were students in the public schools of Iberia Parish. Both enrolled in the summer school program offered by the Iberia Parish School Board for the summer of 2001, each paying tuition in order to repeat a math class which each had failed during the regular school year. A registration packet was provided to each student, and their parents executed documents authorizing their children's attendance and acknowledging their understanding of the policies and requirements of the program. On the first day of the summer school session, both Jose and Bobby attended an Orientation meeting conducted by the summer school principal. The principal stressed the strict attendance policies for the summer school and discussed the fact that all behavioral rules for students during the regular school year would be enforced during the summer school session. Bobby, Jose and their parents understood that if they missed more than two days of summer school, the students would be dropped from the program and could not earn course credit.

On July 5, 2001, two students reported to a teacher that a boy and girl were engaged in sexual conduct in the boys' bathroom. When the teacher investigated, no students were found in the restroom, but a used condom was found in a urinal. The teacher reported his findings to the principal, who interviewed the reporting students. The male student was identified as Jose Ventura; the female student could not be identified by name, but detailed physical descriptions of the girl were provided to the principal. In the course of the investigation, a student positively identified Bobby Moss as the girl he had seen in the boys' bathroom with Ventura.

By the time that Principal Killgore was able to identify Bobby Moss on July 5, the school dismissal time had arrived. Killgore accompanied the girl to her mother's car to inform Mrs. Moss that he was investigating a report of wrongdoing which may involve her daughter. He told the parent that Bobby had denied any involvement, and he indicated that he would call the parent if new information further implicated Bobby. That afternoon, Killgore examined numerous times the campus surveillance videotape of the hallways of the school during the morning session. He confirmed to his satisfaction that Jose Ventura had visited the boys' bathroom with a female student, and he confirmed to his satisfaction the identification of the female as Bobby Moss.

In total, the summer school principal met in person with Moss family members three times on July 5. The parents were informed of the details of the reports about their daughter and the results of Killgore's investigation. They were given an opportunity to review the security videotape, which they watched multiple times. Madeline Moss acknowledged that the girl in the videotape was her daughter Bobby. The parents were told that their daughter would be removed from summer school without receiving a refund of her tuition or credit for her coursework.

On July 6, Principal Killgore attempted to telephone Jose Ventura's mother at home; she was not in. He spoke to Michelle Clark, Mrs. Ventura's cousin, and asked her to have the parent call the school on her return. Killgore also called Jose's football coach, who met in person with Killgore and the student. The coach, student and principal viewed the videotape of the incident. When he was asked questions by the principal inviting him to explain his version of the facts or dispute the charges made by Killgore, Jose testified:

"I just kept my mouth shut." Principal Killgore informed Jose of his findings, and he told Ventura that he would be removed from summer school for going into the boys' bathroom with a female, remaining in the bathroom with her during class time, and assisting the female to exit the bathroom undetected. At Killgore's request, the coach took Jose home from school.

Lucille Ventura returned home before the arrival of her son and his coach on the afternoon of July 6. She heard her son tell Michelle Clark about the incident at school and about his removal from summer school. Mrs. Ventura asked no questions of her son, and she made no effort to contact the coach, the principal, or any other school personnel to inquire about the incident or the removal of her son from summer school. Mrs. Ventura did not meet with Principal Killgore until the following Monday when she appeared at the school in the company of her attorney. The two met at some length with the principal, but they did not view the videotape. Killgore offered to share with the mother and her attorney what evidence he had, but the attorney declined.

On July 9, 2001, Principal Killgore drafted letters to both the Ventura and Moss parents, to inform them in writing that their children had been dropped from summer school and setting out the reasons for the decision. He described the parents' appeal avenue to the superintendent. On the same day, Principal Killgore suffered a heart attack. He did not return to work for the remainder of the summer school session. He was replaced as summer school principal by Jean Reaux, the regular principal at New Iberia Senior High School. Reaux had been at the school at the time of the events described above, and she had been involved in the identification process regarding Bobby Moss.

Before the letters drafted by Killgore could be mailed, on the same day Attorney Lucretia Pecantte-Burton obtained a Temporary Restraining Order from Judge Charles Porter, prohibiting the defendants from preventing Jose Ventura's attendance at summer school. The TRO was served upon Acting Principal Reaux. Because of the issuance of the TRO, school administrators halted the disciplinary process regarding Ventura, and the letter drafted by Principal Killgore was held. At a July 13, 2001 hearing on the school board's Motion to Rescind Temporary Restraining Order, testimony was given by Lucille Ventura, Michelle Clark, Coach Zebulin Simon, Principal Jean Reaux, and Supt. Eugene Baudry. After hearing the testimony and reviewing the evidence, Judge Porter rescinded the Ventura TRO on July 16, issuing detailed Reasons for Judgment including his finding that "Jose Ventura's dismissal from summer school did not violate due process safeguards." On the same date, Attorney Pecantte-Burton obtained a second Temporary Restraining Order on behalf of Jose Ventura from a different judge. On July 17, 2001, the same attorney obtained a Temporary Restraining Order from Judge Carl Williams on behalf of Bobby Moss.

On July 19, while the Ventura and Moss TRO's remained in place, Attorney Pecantte-Burton wrote to the school superintendent, requesting a hearing on the "expulsions" of Ventura and Moss.

On July 20, Judge Carl Williams rendered Judgment on the school board's exception of *res judicata* and no cause of action filed in response to the second request of Ventura for injunctive relief. The judge ordered that the matters at issue were 'moot' since the relief sought could no longer be granted. From that date, the disciplinary process was resumed

by school administrators, and letters originally drafted by Principal Killgore on July 9 were mailed to the plaintiff parents. The summer school session ended July 20, 2001.

On July 23, Principal Reaux sent a letter to the Ventura and Moss parents. She explained that the plaintiff students would not receive credit for the summer school session, per the attendance policy for the session. She also explained that the parents could appeal the decision to the Grievance Committee of the school board. On July 24, Attorney Pecantte-Burton wrote to Supt. Eugene Baudry on behalf of both students, requesting a hearing "before the full school board to review the principal's expulsion of Jose Ventura and Bobby Moss." On July 26, School Board President Clara Carrier wrote to Attorney Pecantte-Burton denying the plaintiffs' request for a hearing before the school board.

On August 6, a Writ of Mandamus was sought on behalf of Jose Ventura, asking the court to compel the issuance of a grade to Jose for the summer school session. Exceptions were filed by the school board and a hearing was held by Judge William D. Hunter on August 30. Judge Hunter ruled that Ventura's attorney had misused the summary proceeding avenue, and he expressed his agreement with the earlier ruling of Judge Porter.

On December 4, 2001, the Louisiana Third Circuit Court of Appeal denied Lucille Ventura's application for supervisory writ from the Judgment of Judge Porter, stating "The trial court did not err in dissolving the TRO as relator's son was afforded due process in his dismissal from summer school." Ventura next sought a supervisory and/or remedial writ from the Louisiana Supreme Court, which application was not considered since it was not timely filed. *Ventura v. Killgore et al.*, 811 So. 2d 894 (La. 2002).

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Determined That The Due Process Claims Of Jose Ventura Are Barred By *Res Judicata.*

In rejecting the Petitioners' claims below and affirming the opinion of the district court, the Court of Appeals' clear and well-reasoned opinion evidences a correct interpretation of the law and demonstrates why this Petition for Writ of Certiorari should be denied. The opinion does not conflict with the earlier decision in *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) or more recent controlling decisions on the issue. The U.S. Fifth Circuit has continued to state in *Nilsen* and since that opinion, .hat an action is barred by the doctrine of *res judicata* if: 1) the parties are identical in both actions; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior judgment was final on the merits; and 4) the cases involve the same cause of action. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979)). "To determine whether the same cause of action is involved, our court utilizes a transactional test." *e.g., Agrilectric Power Partners, Ltd. v. General Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994); *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987). Under this test, the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts. The rule is that *res judicata* "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated."

Howe, 913 F.2d at 1144 (quoting *Nilsen*, 701 F.2d at 560) (footnotes omitted). 37 F.3d 193, *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Louisiana, Inc.*, (C.A.5 (La.) 1994).

In its analysis of Ventura's claims and the controlling jurisprudence, the appellate court cited to *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 37 F.3d 193, 195 (5th Cir. 1994) for its position that Ventura's due process claims are barred under the doctrine of *res judicata*. The *Travelers* case cites to the *Nilsen* case. Clearly, the two are consistent, as was the Fifth Circuit's analysis.

At the heart of Ventura's petition is the claim that the *res judicata* defense was asserted and decided prematurely, before the rendition of a final judgment in the previously filed state court action. Ventura posits that the state court judgment on his due process claims did not become final until the Louisiana Supreme Court declined to consider his writ application on March 15, 2002. This position might be viable if the writ application had been timely made. It was not. Per Louisiana Supreme Court Rule X, Section 5, an application seeking to review a judgment of the court of appeal must be made "within thirty days of the mailing of the notice of the original judgment of the court of appeal." As Petitioner correctly states, notice of the original judgment in the state court case (writ denial by Louisiana Third Circuit Court of Appeal) was mailed on December 4, 2001. Ventura's application to the Louisiana Supreme Court was filed on January 4, 2002. Since December has 31 days, Ventura's application was not filed "within thirty days" of the notice of the original judgment. The representation in Petitioner's application to this court that a writ application was timely made to the state supreme court is incorrect, as evidenced by the Court's ruling attached as Appendix C to Petitioners'

Application. With that failure, the judgment of the Louisiana Third Circuit Court of Appeals became final on January 3, 2002 at the expiration of the time for filing a writ application. The summary judgment motion of Respondents was filed on March 1, 2002. The assertion of the *res judicata* defense in the context of the dispositive motion was not premature. There was clearly a final judgment on the due process issue by the time the motion was filed and considered by the court.

To determine the preclusive effect of a prior Louisiana court judgment, if any, this court must apply Louisiana law. *Amica Mutual Ins. Co. v. Moak*, 55 F.3d 1093, 1096-97 (5th Cir. 1995). In pertinent part, Louisiana's *res judicata* statute provides that

> [e]xcept as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: . . . (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action. La. R.S. 13:4231.

Even Petitioner concedes that the preclusive effect of a judgment attaches once a final judgment has been signed by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal. Petitioner also asserts that "if a certiorari application is filed, the court of appeal judgment becomes final and definitive when the supreme court denies the application for certiorari." [Petitioners' Application, p. 8] The argument overlooks the specific

language of La. C.C.P. article 2166(E): "If an application for certiorari to the supreme court is *timely filed*, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari." [Emphasis added]

In the instant case, Ventura did not *timely file* an application for certiorari. Consequently, the Louisiana Supreme Court did not consider the application at all. Thus, the court of appeal judgment became a final/definitive judgment when the deadline for timely filing of the writ application expired. Clearly, the District Court and the Fifth Circuit Court of Appeals correctly found that Jose Ventura's due process claims are barred by *res judicata*. There is no reason to revisit those decisions.

B. The Court Of Appeals Correctly Dismissed The Due Process Claims Of Bobby Moss Based On The Controlling Decision Of *Goss v. Lopez*, 419 U.S. 565 (1975).

Having affirmed the district court's judgment regarding Jose Ventura, the Fifth Circuit next addressed the Due Process claims of Bobby Moss, which had not been previously litigated. The appellate court assumed without deciding that the Due Process Clause is applicable to a summer school session. Even with that assumption, however, the court concluded that the evidence in the record showed that Bobby Moss received the requisite notice and opportunity to be heard before she was removed from summer school. [Appendix A of Petition for Writ of Certiorari] That conclusion was correct and well-supported by the record and the guiding case of *Goss v. Lopez*, 419 U.S. 565, 581-84 (1975).

The record demonstrates that Bobby Moss was reasonably afforded the opportunities outlined in the applicable Louisiana statute at La. R.S. 17:416. Both Bobby and her parents were advised by the principal of the misconduct of which the student was accused; both the student and her parents were afforded the opportunity to view the videotape of Bobby's actions. Bobby had multiple opportunities to explain her version of the facts. Her parents met in person with Principal Killgore on multiple occasions. Due Process in schools does not require that a court of law be convened to hear every suspension. School disciplinary codes cannot be drawn with the same precision as criminal codes, and some degree of discretion must be left to public school officials to determine what forms of misbehavior should be sanctioned. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973). It is well-established that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Under the time-compressed conditions imposed by the summer school schedule and the practicalities associated with the events at issue, the record demonstrates the adequacy of the due process opportunities afforded to both plaintiffs in the instant case. The actions of the school administrators afforded Bobby Moss and her parents prompt notice of events at issue and every opportunity to be heard. These are the requirements set out in *Goss v. Lopez*. That they were met in the instant case is well-documented in the record.

C. The Individual Defendants Were Correctly Dismissed Based Upon Qualified Immunity.

Since both the district and appellate courts found no Constitutional violation in this case, the qualified immunity asserted by and afforded to the individual defendants was given only short review by the district court and the appellate court. Although Petitioners do not raise the issue as a separate question presented in the writ application, some reference is made to the immunity issue in the pages of the application. Respondents simply comment, in an abundance of caution, that it is well-settled that when a defendant in a § 1983 action claims qualified immunity, the court's first task is to assess whether the plaintiff's allegations are sufficient to establish the violation of a constitutional or statutory right at all, in which case the court must next determine whether, as a legal matter, the right that the defendant's conduct allegedly violates was a clearly established one, about which a reasonable person would have known; if so, then defendant is not entitled to qualified immunity, but if plaintiff's allegations fail to satisfy either inquiry, defendant is entitled to summary judgment based on qualified immunity. 42 U.S.C. § 1983. Applying this analysis to the facts in the summary judgment record justifies the grant of immunity to the individual defendants since the courts concluded that there was no violation of a "clearly established" right of any plaintiff. That conclusion warrants the dismissal of the individual defendants based on immunity.

CONCLUSION

Because the courts below have properly interpreted the law and this Court's precedent, and, because there is no factual basis for Petitioners' claims, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NORA M. STELLY
ALLEN & GOOCH
1015 St. John Street
Post Office Box 3768
Lafayette, Louisiana 70502
(337) 233-5056

Attorneys for Respondents